Supreme Court, U.S.
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No. 05-1594

IN THE

Supreme Court of the United States

MITZI INTERNATIONAL HANDBAG & ACCESSORIES, LTD.,

Petitioner,

v.

ROMAG FASTENERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is a party precluded from bringing a post-verdict motion for judgment as a matter of law pursuant to Rule 50(b) F.R.Civ.P. when the party failed to move for judgment as a matter of law after a patent claim construction ruling but prior to submission of the case to the jury pursuant to Rule 50(a) F.R.Civ.P.?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Romag is a privately-held company, has no parent and no publicly-held company owns ten percent or more of Romag's stock.

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INTRODUCTION

Respondent ROMAG FASTENERS, INC. ("Romag") hereby opposes the issuance of a writ of certiorari to the Court of Appeals for the Federal Circuit sought by petitioner MITZI INTERNATIONAL HANDBAG & ACCESSORIES, LTD. ("Mitzi").

Mitzi seeks a writ of certiorari to review a judgment issued without opinion of the Court of Appeals for the Federal Circuit, affirming a judgment of the District Court for the Southern District of New York entering a jury verdict. Although there is virtually no record for this Court to review, Mitzi claims that it was deprived of its right to challenge the jury verdict because it failed to make a motion for judgment as a matter of law prior to submission of the case to the jury.

Mitzi's failure to comply with the Federal Rules of Civil Procedure was a matter of trial strategy or a blunder. Mitzi has to live with the consequences of its acts and accept the verdict of the jury and two reviewing courts. There is no constitutional issue or split of authority among the circuits justifying this court's review of Mitzi's failure to comply with the rules. There is no good reason to grant the writ sought by Mitzi.

STATEMENT OF THE CASE

Mitzi's statement of facts is incorrect in several material respects which negate the entire basis for its argument as to why the writ should be issued.

Mitzi contends that it had no opportunity to move for judgment as a matter of law ("JMOL") under Rule 50(a) F.R.Civ.P., because the District Court did not make a patent claim construction ruling until after the opportunity to make a JMOL motion had passed. This is factually incorrect.

First, the District Court made a claim construction ruling long before trial. A Magistrate Judge made a construction in a recommendation dated February 3, 2004, which recommendation was approved and ordered by the District Judge on June 22, 2004. The trial did not begin until November 29, 2004, more than five months later. The parties should have assumed that the claim construction would remain in effect for trial. Thus, based on that claim construction, Mitzi could have moved for JMOL under Rule 50(a) at the close of the evidence. Mitzi made no Rule 50(a) motion.

Second, at the close of all testimony, on December 1, 2004, the District Court, after sending the jury home for the evening and hearing Romag's Rule 50(a) JMOL motions (Court of Appeals Appendix A668-A673), announced to counsel for the parties a proposed claim construction to be included in the jury charge (Tr. 343-344). Both counsel asked to consider the claim construction overnight and the trial was adjourned for the evening (Tr.345). The following morning, December 2, 2004, the parties commented upon and stated their objections to the proposed jury charge (Tr.350-366).

Romag objected to the claim construction. Mitzi did not. The Court then said, "Anything else we need to do on the record?" (Tr.366). Mitzi's counsel did not respond by making a Rule 50(a) motion or otherwise. The Court then recalled the jury, the parties gave closing arguments, the Court read the charge, and the jury retired to deliberate.

Mitzi also contends that the District Court's amended claim construction was such that it would have mandated JMOL in favor of Mitzi. Again, this is not factually correct.

First, the amended claim construction did not substantially change the initial claim construction. The initial construction by the Magistrate Judge, as adopted by the District Judge, concluded that the term "rotatable" in claim 3 of Romag's Patent No. 5,722,126 meant that the attachment legs were "capable of being rotated" (A238).

The amended claim construction stated:

> I instruct you that for purposes of this lawsuit, rotatable means capable of being rotated and not rigidly secured. The pair of legs is not rigidly secured if it does not resist rotation. Rotatable, however, does not imply that the legs must rotate freely. The definition of rotatable should be considered in light of the reasons that the legs were made rotatable, which was to allow coating solutions to reach all surfaces of the fastener thereby giving greater corrosion protection. (A737-38).

Romag objected to that claim construction. Mitzi did not (A681-90).

Obviously, the precise words of the amended claim construction are not the same as those in the initial claim construction. The jury was given latitude to determine the degree of resistance to rotation required for infringement. Resistance must be low enough to permit rotation, but not so low that the parts rotate "freely". After reviewing the evidence and the testimony, the jury was entitled to reach a verdict in favor of Romag by applying the Court's claim construction.

Second, if the amended claim construction precluded judgment for Romag, as Mitzi now contends, them Mitzi should have been quick to move for JMOL under Rule 50(a) after the amended claim construction was made and before the jury was reconvened to hear closing arguments and the charge. Mitzi did not do so. This failure to move precluded Romag from putting on any additional testimony to ensure that there was sufficient evidence to support the jury verdict.

REASONS FOR DENYING THE PETITION

I. The Federal Circuit Followed The Long-Established Practice That A Rule 50(b) Motion Requires The Prior Making Of A Rule 50(a) Motion.

A. The Federal Rules of Civil Procedure Clearly Require That A Motion For Judgment Be Made Before Submission Of the Case To The Jury.

Mitzi suggests that there is no clear authority requiring that a Rule 50(a) motion be made in order to bring a Rule 50(b) motion. To the contrary, the Federal Rules of Civil Procedure are crystal clear that this is necessary and the appellate decisions confirming that requirement are legion. *See United States ex rel. A+ Homecare, Inc. v. Medshares*

Mgmt. Group, Inc., 400 F.3d 428, 447 (6th Cir. 2005) ("It is well-settled that a court can only consider a motion for a judgment notwithstanding the verdict *only if* the moving party has previously made a motion for a directed verdict at the close of all the evidence."); *Collado v. United Parcel Serv Co.*, 419 F.3d 1143, 1152, n. 6 (11th Cir. 2005); *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 638 (7th Cir. 2003). The cases cited by Mitzi to the contrary are inapposite or do not support Mitzi's position.[1]

There is good reason for strict adherence to the Rule 50(a) requirement. The purpose of the rule is to alert the opposing party to the supposed deficiencies in its proof. This gives the non-moving party an opportunity to cure any deficiency in the proof that may have been overlooked. *See Broadnax v. City of New Haven*, 415 F.3d 265, 268 (2d Cir. 2005); *United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 960 (5th Cir. 1998). To allow a JMOL motion to be filed for the first time post-verdict precludes the non-moving party from curing the defects and thereby obtaining its constitutional right to a jury trial.

Mitzi suggests that any JMOL motion must be made at the precise time that the evidence closes, or at the particular time that the Court schedules to hear JMOL motions. To the contrary, Rule 50(a) F.R.Civ.P. states that a motion for JMOL "may be made at any time before submission of the case to

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1. For example, in *Cruz* (Mitzi Br. 19), the Second Circuit reiterated the necessity for a Rule 50(a) motion before bringing a Rule 50(b) motion. The same is true of the Seventh Circuit's decision in *McKinnon* (Mitzi Br. 19), and the Ninth Circuit's decision in *Pierce* (Mitzi Br. 11). In *John Hopkins* (Mitzi Br. 13) there had been a motion under Rule 50(a) during trial, and in *Scottish Heritable Trust* (Mitzi Br. 19), there had been an objection to the jury instruction.

the jury." A case normally is submitted to the jury when the jury is sent to the jury room for deliberations. Indeed, in some cases, a Rule 50(a) motion may be made even after the jury has retired but before deliberations have begun. 9 Moore's Federal Practice §50.20[1] (2001).

Rule 50(b) F.R.Civ.P. deals only with renewed motions for JMOL. Rule 50(b) applies only where a court does not grant a JMOL motion before the case is submitted to the jury. It is intuitively obvious that a party cannot "renew" a motion which it has not previously made. Therefore, the failure to make a Rule 50(a) motion before the jury has retired to deliberate normally means that a party cannot make a Rule 50(b) motion after the verdict.

B. The Unitherm Case Does Not Change The Law In Any Manner Favorable To Petitioner.

Mitzi relies heavily upon the recent decision in *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. __, 126 S. Ct. 980, __ L. Ed. 2d __ (2006). Mitzi contends that *Unitherm* requires that Rule 50 be interpreted liberally and consistently with principles of fairness.

Unitherm involved a party making a Rule 50(a) JMOL motion, but failing to renew the motion post-verdict under Rule 50(b). This, of course, is the opposite of the present situation. Here, Mitzi failed to make the Rule 50(a) motion and then sought to make the motion post-verdict under Rule 50(b). Both the majority and dissenting opinions in *Unitherm* agreed that the right to trial by jury might be impacted if no Rule 50(a) motion is made. (Compare 126 S. Ct. at 986, n. 4, with Dissent at 990, footnote). Thus, there can be no disagreement that to vacate a jury verdict as a matter of law

when no Rule 50(a) motion had been made would deprive the non-moving party of its constitutional right to trial by jury.

Contrary to Mitzi's contention, and to the extent applicable at all to this case, *Unitherm* reiterates the long-established practices that a litigant must comply with the procedures before the District Court or it will be precluded from raising the issue on appeal, and that an Appellate Court is not permitted to excuse non-compliance with Rule 50 in the District Court and thereby review the jury verdict for sufficiency of the evidence except for rare exceptions not applicable here. *Unitherm* does not help Mitzi in this case.

C. Petitioner Had Sufficient Opportunity And Motivation To Make A Rule 50 (a) Motion In The District Court.

Despite its claim to lack of opportunity, Mitzi had the chance to make a Rule 50(a) motion, but either chose not to do so or simply failed to do so.

First, as explained above, Mitzi could have made a Rule 50(a) JMOL motion at the close of evidence and before submission to the jury based on the initial claim construction made as a result of a summary judgment motion. Mitzi stood mute.

Second, Mitzi could have made a Rule 50(a) JMOL motion based on the amended claim construction after the charge conference and before closing arguments, the jury charge and the submission of the case to the jury. The amended claim construction was, in essence, a jury instruction, and Mitzi had an opportunity to seek JMOL once

the instruction was finalized. Again, Mitzi stood mute, despite the Court's invitation following the charge conference to raise any additional issues for the record (Tr.366).

Clearly, Mitzi's failure to move for JMOL until after the jury reached a verdict was a matter either of its own trial strategy or of its counsel's inattention. As the dissenting opinion noted in *Unitherm*, "Murphy's law applies to trial lawyers as well as pilots. Even an expert will occasionally blunder." (Dissent at 989).

D. The Court Of Appeals Properly Affirmed The District Court's Denial Of The Rule 50(b) Motion.

Mitzi complains that the Court of Appeals for the Federal Circuit gave short shrift to its argument that its Rule 50(b) motion should not have been denied. Here, the Federal Circuit affirmed the District Court without opinion under Rule 36 F.R.A.P. Since the standard for review of the denial of a Rule 50(b) motion is whether there was a complete absence of evidence such that the jurors could not arrive at the verdict, *Samuels v. Air Transp Local 504*, 992 F.2d 12, 14 (2d Cir. 1993); *Stratton v. Dep't for the Aging of New York*, 132 F.3d 869, 878 (2d Cir. 1997), the Federal Circuit's affirmance can be read simply as a determination that there was not a complete lack of evidence. Thus, the jury verdict should stand.

II. This Case Involves No Constitutional Issues Or A Split Of Authority Warranting Consideration By This Court.

Mitzi postures this case as presenting an interesting question of law or as a request for guidance in interpreting precedents. Nothing could be further from the truth.

This case is no more than a straight-forward patent infringement action whose outcome is of interest only to the parties. There was a jury verdict for Romag. Mitzi failed to preserve its legal position to challenge the verdict, or at least embarked on a trial strategy which did not take that situation into account. Mitzi did not like the jury verdict and then sought to deprive Romag of the fruits of victory. The District Court declined to interfere with the verdict and the Court of Appeals agreed. The case is over. Mitzi's complaints are too little and too late.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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